86-980

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

DUKE B. KELLY,
Petitioner,

vs.

WAUCONDA PARK DISTRICT,
a local Governmental Agency
of the State of Illinois,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SEVENTH CIRCUIT COURT OF APPEALS

COUNSEL FOR PETITIONER:

TIMOTHY P. WHELAN
PIETSCH, CUCHNA, POPEJOY
AND WHELAN
2100 Manchester Road
Suite 615
Wheaton, Illinois 60187
(312) 260-6350

The Scheffer Press, Inc.—(312) 263-6850

QUESTION PRESENTED

I. Whether state and local government that employ fewer than 20 employees are "employers" within the meaning of §11(b) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 630(b).

PARTIES TO THE PROCEEDING

Petitioner:

Duke B. Kelly

Respondent:

Wauconda Park District, a local Governmental Agency of the State of Illinois

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SEVENTH CIRCUIT COURT OF APPEALS

Petitioner Duke B. Kelly prays that a writ of *certiorari* be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the order of the District Court is reported at 801 F.2d 269. It appears in Appendix A to this petition. The opinion of the United States District Court for the Northern District of Illinois is reported at 612 F. Supp. 1201. It appears in Appendix B to this petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1986. This petition is filed within ninety days thereof. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTE INVOLVED

The following sections of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634 (hereinafter referred to as the "ADEA"), are involved in this case:

ADEA §§11(a) & (b), 29 U.S.C. §§630(a) & (b):

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporation, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

STATEMENT OF THE CASE

A. FACTS

Petitioner, Duke B. Kelly, began employment with respondent, Wauconda Park District, in 1972 as a maintenance worker. He was terminated in February 1983 at age 65 and replaced by a person under age 40.

Respondent, Wauconda Park District (Wauconda) is governed by an elected Board of Commissioners and is funded by a special tax and program revenues. 801 F.2d at 270. Wauconda employs a full-time director of Parks and Recreation who also serves as Secretary to the Board of Commissioners. *Id.* Wauconda also employs a number of seasonal and part-time employees. *Id.*

On or about December 1, 1983, Petitioner filed charges with the Equal Employment Opportunity Commission against Respondent, alleging discriminatory termination based on age in violation of the Age Discrimination in Employment Act of 1967, as amended, "ADEA", 29 U.S.C. §621 *et seq.*

B. PROCEEDINGS BELOW

Petitioner filed a complaint in the United States District Court of Northern Illinois on February 15, 1985 under the ADEA. Respondent filed a Motion to Dismiss the complaint alleging that it was not an "employer" as defined by § 11(b) of the ADEA, 29 U.S.C. § 630(b), because it did not employ 20 or more employees. Petitioner responded that when Congress amended the ADEA in 1974 to apply to public employers, Congress did not impose the 20 employee minimum as a limitation on coverage.

The District Court granted Respondent's Motion to Dismiss holding that the similarities between the 1972 amendments to Title VII[1] and the 1974 amendments to the ADEA extending coverage to government employers indicated that Congress did not intend to make the ADEA applicable to government employers of less than 20 employees. 612 F. Supp. at 1203. The District Court did not compare the language of the ADEA to the Title VII amendments or note any differences in the text of the amendments. The District Court further reasoned that "common sense" dictated that public employers covered by the ADEA should be subject to the same standards as private employers. *Id.*

Petitioner appealed to the Seventh Circuit Court of Appeals arguing that the explicit language of the ADEA did not impose any minimum employee requirement in the definition of employer in § 11(b) of the ADEA. Jurisdiction for this Appeal was conferred upon the Court pursuant to 28 USC 1295(a)(1). Respondent argued that the 1972 amendment to the definition of employer in Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-5(g) contained a minimum employee requirement and was thus appropriate guidance for interpreting the ADEA. The Seventh Circuit observed that both parties

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[1] Title VII of the Civil Rights Act of 1964 initially excluded state and local governments from its coverage. 42 U.S.C. §2000e(a). The definition of a "person" covered by Title VII was amended in 1972 to expressly include governmental entities. Pub. L. No. 92-261, 86 Stat. 103 (1972). Thus, the 15 employee requirement attached to "a person engaged in an industry" in the definition of "employer," 42 U.S.C. §2000e(b), has been applied to government employers in Title VII cases. *See Roger v. Noone*, 704 F.2d 518 (11th Cir. 1983); *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980).

presented reasonable constructions of the statute and concluded that the language of § 11(b) of the ADEA was not "unambiguous". 801 F.2d at 271. To resolve this apparent ambiguity, the Seventh Circuit reviewed the legislative histories of the ADEA and Title VII and found that the amendments to both statutes were designed "to accomplish the same result subjecting public and private employers to the same employment discrimination coverage." 801 F.2d at 272. The Seventh Circuit was apparently concerned that applying the ADEA to public employers with less than twenty employees would extend the ADEA's reach farther than the scope of Title VII and viewed that consequence as an "anomalous result". 801 F.2d at 273. Relying on language from this Court's opinion in *EEOC* v. *Wyoming*, 460 U.S. 226, 231 (1981), the Seventh Circuit remarked that the problem of age discrimination is less serious than race or sex discrimination which was prohibited by law first and contains a lower minimum-employee threshold than the ADEA. *Id.* Consequently, the Seventh Circuit Court of Appeals concluded that the scope of coverage of the ADEA could not be broader than the reach of Title VII and therefore required a minimum-employee threshold for ADEA coverage of state and local government employers.

REASONS FOR GRANTING THE WRIT

I. EXTENDING ADEA COVERAGE TO GOVERNMENTAL BODIES REGARDLESS OF THEIR SIZE IS AN IMPORTANT QUESTION OF LAW WHICH THIS COURT HAS NOT RESOLVED.

This case presents the Court with an opportunity to resolve an important issue of coverage under the Age Discrimination in Employment Act of 1967, as amended, "ADEA", 29 U.S.C. Section 621 *et seq.* The issue in this case is whether the 1974 amendment to the definition of employer in § 11(b) of the ADEA is limited to state and local governments with 20 or more employees. The Seventh Circuit, in its decision below, held that the ADEA does not apply to public employers with less than 20 employees. The Seventh Circuit's analysis and decision affirmed that limitation on ADEA coverage which contravenes the clear language of the Statute.

While other courts, including this Court have reviewed the constitutionality of § 11(b) of the ADEA, no court, other than the Northern District of Illinois and the Seventh Circuit Court of Appeals has imposed the 20 employee minimum as a threshold for ADEA coverage. The determination by the Northern District of Illinois Court as affirmed on appeal is in direct conflict with the Northern District of Ohio.

In *EEOC* v. *Hudson Township,* No. C85-2612A (N.D. Ohio, March 13, 1986), the court favored a "disjunctive reading" of §11 of the ADEA and found that the minimum employee requirement does not apply to state and local governments.

In *EEOC* v. *Wyoming,* 460 U.S. 226, 243 (1983), the Court found that the 1974 amendments to the ADEA ex-

tending coverage to state and local governments was a valid exercise of the Commerce Clause. The effect of the Seventh Circuit's decision in this case is to limit the extension of statutory coverage found constitutional in *Wyoming*. Because the lower court's decision ignores the express language of the statute, petitioner requests that this Court grant the writ of *certiorari* in order to resolve this important question of a federal statutory remedy and the extent of its coverage and protection to Employees employed by the many of government agencies with less than 20 employees.

II. THE SEVENTH CIRCUIT'S RELIANCE ON TITLE VII PRECEDENT DISREGARDS THIS COURT'S GUIDANCE FOR INTERPETING THE ADEA.

In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), this Court held that it is improper to interpret the ADEA by relying on Title VII precedent where there are significant differences in the language of the provisions of the ADEA and Title VII. In *EEOC* v. *Wyoming*, 460 U.S. 260 (1983), this Court also recognized a distinction between the ADEA and Title VII in Congress' selection of differing authority for extending coverage under the statutes to state and local governments. Because the decision of the Seventh Circuit below disregards the significance of distinctions in the ADEA and Title VII and thereby threatens to erode differences intended by Congress, petitioner urges the Court to grant its petition for review.

Lorillard v. *Pons*, 434 U.S. 575, sets the framework for interpreting the ADEA insofar as Title VII precedent may be relevant in construing the ADEA. In *Lorillard*, this Court considered whether the ADEA provided a statutory right to a jury trial in the absence of an explicit statutory provision. The Court looked first to the language

of the statute and found a significant difference in the language of the ADEA compared to language in a similar provision of Title VII. The Court observed that while Congress had explicitly provided for "legal and equitable relief" in the ADEA, § 7(b), 29 U.S.S. § 626(b), Congress only provided for "equitable relief" in Title VII, 42 U.S.C. § 2000e-5(g). 434 U.S. at 584. The Court held that reliance on Title VII for interpreting the ADEA was misplaced given this clear difference in the language of similar statutory provisions. 434 U.S. at 585. Thus, even though the ADEA and Title VII share similarities in their aims and certain substantive provisions, textual differences in the statutes must be maintained where Congress has created a distinction in the statutes.

Clearly, this Court's holding in *Lorillard* v. *Pons* precludes reliance on Title VII precedent in interpreting § 11(b) of the ADEA to determine the scope of coverage over state and local government employers. *Lorillard's* framework and guidance were essentially ignored by the Seventh Circuit Appellate Court below in its determination of coverage under § 11(b) of the ADEA. Without even a cursory comparison of the language of the Title VII amendment to the definitions of "person" and "employer", the district court relied entirely on Title VII to impose a minimum-employee requirement on the ADEA's coverage of public employers. In affirming the district court's decision, the Court of Appeals considered the petitioner's and the respondent's opposing constructions of § 11 of the ADEA and concluded that the provision was ambiguous. Appendix A at 4. Again, without examining the textual differences in the language of the ADEA and Title VII amendments, the circuit court relied on Title VII precedent for its decision.

First and most importantly, a literal reading of the 1974 amendment to § 11 of the ADEA shows that Congress created a separate definition of the term "employer" when it added state and local governments to part (b) of the definitional section in § 11 of the ADEA.[2] The 1974 ADEA amendment did not alter the definition of the term "person" contained in part (a) of § 11. In contrast, Congress amended Title VII by adding governmental entities to the definition of the term "person" in part (a) of § 701 of Title VII.[3] Stated simply, Congress employed different

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[2] Fair Labor Standards Amendments of 1974, Pub.L. No. 93-259, 88 Stat. 55.

[3] The 1972 amendments to § 701 (a) and (b) of Title VII, 42 U.S.C. §§ 2000e(a) and (b) are provided as follows with emphasis added:

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions,* labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *15* or more employees for each working day in each of 20 or more calendar weeks n the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, and Indian tribe, or *any department or agency of the District of Columbia subject by statute or to procedures of the competitive service (as defined in §2102 of Title V of the United States Code),* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under §501 (c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972,* persons having fewer than 25 employees (and their agents) shall not be considered *employers.*

language and amended different terms in extending coverage under the ADEA and Title VII to public employers. Based on this court's reasoning in *Lorillard,* the Seventh Circuit's analysis and holding are erroneous given the clear differences in the language of the ADEA and Title VII.

Not only is the lower court's disregard for the differences in statutory language in derogation of the analytical framework of *Lorillard,* but the Seventh Circuit further ignored *Lorillard's* guidance concerning the ADEA's origins in the Fair Labor Standards Act, "FLSA", 29 U.S.C. § 201, *et seq.* This Court recognized the importance of the ADEA's incorporation of provisions from the FLSA in that the FLSA, not Title VII, is often the appropriate tool for interpreting the ADEA. 434 U.S. at 585.

The significance of certain distinctions between the ADEA and Title VII amendments extending coverage to public employers was further confirmed in *EEOC* v. *Wyoming,* 460 U.S. 226. In that case, the extension of the ADEA to public employers was a valid exercise of the Commerce Clause. The ADEA amendments of 1974 were part of a broader extension of the FLSA to public employees which was also founded on the Commerce Clause.[4]

In contrast, Title VII's extension of coverage to public employers was explicitly enacted under the 14th amend-

---

[4] Extension of the FLSA to state and local government employers under the Commerce Clause was recently declared constitutional in *Garcia* v. *San Antonio Metropolitan Transit Authority,* ..... U.S. ....., 105 S. Ct. 1005 (1985), overruling *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) which had initially declared the extension unconstitutional.

ment.[5] Since the FLSA does not contain any minimum employee restriction, it is arguable that the Commerce Clause does not require such a limitation in order to permit a constitutional extension of coverage. In other words, Congress was not required nor is a Court compelled to impose a minimum employee requirement in order to validate the extension of the ADEA to state and local government employers.[6]

It is important for this court to resolve the inappropriate reliance on Title VII and construe the language of the Statute in accordance with the clear meaning provided by Congress.

CONCLUSION

For the foregoing reasons, the petition of Duke B. Kelly should be granted.

DATED: DECEMBER 10, 1986

Respectfully submitted,

TIMOTHY P. WHELAN
PIETSCH, CUCHNA,
POPEJOY & WHELAN
2100 Manchester Rd.
Suite 615
Wheaton, IL 60187
Tel. 312-260-6350
Attorney for Petitioner
Duke B. Kelly

[5] H.R. Rep. No. 92-238, 92d Cong., 2d Sess. reprinted in (1972) U.S. CODE CONG. & AD. NEWS 2131, 2154.

[6] Nor has there been any claim that applicaton of the ADEA to small local employers would exceed the authority granted by the Commerce Clause.

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2390
DUKE B. KELLY,

Plaintiff-Appellant,

v.

WAUCONDA PARK DISTRICT, a local Governmental Agency of the State of Illinois,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 01462—CHARLES P. KOCORAS, *Judge.*

ARGUED APRIL 10, 1986—DECIDED SEPTEMBER 12, 1986

Before WOOD, JR., and RIPPLE, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

WOOD, JR., *Circuit Judge.* The plaintiff, Duke Kelly, alleges that the Wauconda Park District fired him because of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.* The district court granted the defendant's motion to dismiss, finding that the Wauconda Park District was not an "employer" as defined by the ADEA. The district court determined that in passing the 1974 amendment to the ADEA adding states and state political subdivisions to the ADEA Congress did not intend to expose government employers to broader coverage than that of private employers. The issue we must decide is an important one: whether a state

or state political subdivision, like a private employer, must employ at least "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" to qualify as an "employer" under the ADEA. We affirm the decision of the district court.

Duke Kelly waas hired by the Wauconda Park District as a maintenance worker in 1972. His job apparently involved groundskeeping duties in the parks. He continued in that position until he was fired on February 15, 1983. He filed suit on February 15, 1985, claiming the defendant fired him because of his age.

The Wauconda Park District is an autonomous local government body located in the Village of Wauconda, a town of 5,700 people. It is governed by an elected Board of Commissioners who serve without pay. A special, local property tax, along with revenues from programs and services provided by the Park District, generates all of the Park District's finances. In 1982, the Park District was comprised of less than 18 acres of land and had a total budget of approximately $120,000.

The Park District has only one full-time, year-round employee, Caroline Kelling, who serves both as Director of Parks and Recreation and as Secretary to the Board of Commissioners. According to Kelling's affidavit, which Kelly does not challenge, thirteen employees worked for the Park District in each calendar year 1981 and 1982. Only two of these employees worked five days in each of twenty or more weeks in 1981 and 1982. Between 1981 and 1985, the Park District has never had more than three employees work five days in each of twenty or more weeks in any calendar year.

We thus face squarely the question whether the twenty-employee minimum for ADEA private-entity employers applies to government employers. If it does, then the Wauconda Park District is not an employer for purposes of the ADEA. If it does not, then Kelly may proceed with his age discrimination claim.

The ADEA definition of "employers," 29 U.S.C. § 630(a) & (b), provides:

> (a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any local organized group of persons.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . . The term [employer] also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State. . . .

The first issue we must decide is whether the definition of employer in section 630 is ambiguous. If the plain language of the statute is clear, we do not look beyond those words to interpret the statute. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). When the statute's language is ambiguous, we look to the legislative history of the statute to guide our interpretation. *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1313 (7th Cir. 1978).

Kelly argues that, by setting state and political subdivisions in a separate sentence, Congress unambiguously indicated that government employers were a separate

category of employers not subject to the twenty-employee minimum. Although Kelly's reading of the statute is certainly a fair and reasonable one, we disagree that the language is capable of only that interpretation.[1] Indeed, Kelly weakens his argument that the statute is unambiguous by arguing that we should look at "common sense" and congressional intent in deciding that the statute is unambiguous.

More significantly, the Park District enunciates another fair and reasonable interpretation of section 630(b)—that Congress, in amending section 630(b), merely intended to make it clear that states and their political subdivisions are to be *included* in the definition of "employer," as opposed to being a separate definition of employer. Under this interpretation, government employers would be subject to the same limits as other employers. Because both Kelly and the Park District present reasonable, but conflicting, interpretations of the plain meaning of section 630(b), we cannot say that the statute is unambiguous. We therefore must look to the legislative history to guide our interpretation. *Tex-Tow,* 589 F.2d at 1313.

Judge Kocoras decided that "[t]he legislative history of the 1974 amendment, the similarities between it and a

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[1] The Equal Employment Opportunity Commission ("EEOC"), in its *amicus* brief, argues that the two sentences in section 630(b) are written in the disjunctive form and therefore must be given separate meanings. Actually, sentences connected by the word "also" are conjunctive. *See American Heritage Dictionary* 97 (1982). Nevertheless, there are dangers in attempting to rely too heavily on characterizations such as "disjunctive" form versus "conjunctive" form to resolve difficult issues of statutory construction. Although connecting words such as "and," "or," or "also" are often helpful keys to unlocking Congress's intent, we must still look at all parts of the statute.

parallel amendment of Title VII, and common sense" all favor the defendant's reading of section 630(b). 612 F. Supp. 1201, 1202-03 (N.D. Ill. 1985). Kelly vigorously contests the district court's decision, in particular its reliance on Title VII law. Kelly argues that because Congress used different language in defining employers under Title VII, as opposed to the ADEA, the legislative history of the 1972 Title VII amendment adding government employers to Title VII sheds no light on Congress's intent in passing the 1974 ADEA amendment.[2]

We believe that the district court was correct in giving some consideration to the parallel amendment of Title VII. Senator Bentsen of Texas, the sponsor of the 1974 ADEA Amendment, first proposed the addition in March 1972, at the same time Congress was considering and enacting the amendment to Title VII. *See EEOC v. Elrod,* 674 F.2d 601, 604 (7th Cir. 1982). The Supreme Court and our court have recognized "important similarities" in objectives, substantive prohibitions, and legislative histories between the ADEA's protection against age discrimination and Title VII's protection against employment discrimination on the basis of race, sex, or religion. *Lorillard v. Pons,* 434 U.S. 575, 584 (1978); *EEOC v. Elrod,* 674 F.2d at 607.

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[2] The EEOC suggests that the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, provides a better parallel for interpreting the ADEA because Congress enacted the amendments to the ADEA and the FLSA together in 1974. This is a non sequitur, however, because, as we noted in *EEOC v. Elrod,* "the connection of the ADEA amendment to the legislation enacting FLSA amendments was largely fortuitous." 674 F.2d at 610. The FLSA has never had a minimum-employee limit for public or private employers, so Congress's intent in amending the FLSA has no bearing on the interpretation of section 630(b).

Both statutes originally applied only to private employers with a certain minimum number of employees. The ADEA currently requires twenty employees, while Title VII requires fifteen. *Compare* 29 U.S.C. § 636(b) *with* 42 U.S.C. § 2000e(a) & (b). Kelly does not contest that the language and case law of the 1972 Title VII amendment apply the fifteen-employee minimum to both government and private employers. *See, e.g., Rogero v. Noone*, 704 F.2d 518, 520 (11th Cir. 1983).

The Park District, while conceding that Congress did not use identical language in the two amendments, points out that Senator Bentsen, the ADEA amendment's sponsor, explained that the Senate approved the Title VII amendment on the theory "that employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector . . . ." 118 Cong. Rec. 15,895 (1972). Senator Bentsen went on to say that "I believe that the principles underlying those provisions in the EEOC bill are directly applicable to the Age Discrimination in Employment Act." *Id.* The district court was therefore correct in deciding that Congress's extension of the ADEA was related to the prior parallel amendment of Title VII.

Moreover, the legislative histories of both the ADEA and Title VII amendments indicate that Congress's main purpose in amending the statutes was to put public and private employers on the same footing. The Senate Special Committee on Aging supported extending the ADEA because "it is difficult to see why one set of rules should apply to private industry and varying standards to government." *See* Special Committee on Aging, U.S. Senate, *Improving the Age Discrimination Law*, at 17 (1973) ("Senate Special Committee Report"). Both the Senate

Special Committee on Aging Report and the House Report supporting the ADEA amendment, H.R. Rep. No. 257, 93d Cong., 2d Sess. (1974), recommended adding public employers to the ADEA as well as lowering the minimum number of employees from twenty-five to twenty. Neither report drew any distinction between the coverage of public and private employers. The Senate Special Committee Report stated that the proposed amendments would make the ADEA "more consistent" with Title VII, which covered all employers, public or private, with fifteen or more employees. *See* Senate Special Committee Report, at 3.

Following the 1974 ADEA amendment, Senator Bentsen stated that "[t]he passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector." 120 Cong. Rec. 8768 (1974). This court noted, in *EEOC v. Elrod*, that "[t]he final enactment of the ADEA amendment in 1974 completed coverage of public employees on the same basis as private employees." 674 F.2d at 607.

In the face of this evidence that Congress intended section 630(b) to apply the same coverage to both public and private employees, Kelly fails to offer any evidence from the legislative record of the 1974 ADEA amendment from the legislative record of the 1974 ADEA amendment which supports his interpretation of section 630(b). He bases his argument entirely upon the difference in language between the 1972 Title VII amendment and the 1974 ADEA amendment. Just because the language of a subsequent statute is not identical to the earlier statute on whch it was modeled, we do not necessarily assume that Congress intended to change the meaning. *See, e.g., McElroy v.*

United States, 455 U.S. 642, 651 n.14; *United States v. Moore,* 613 F.2d 1029, 1042-43 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 954 (1980). That is particularly true where, as here, Congress gave no indication that it intended to change the meaning. In fact, Kelly concedes that the legislative record does not reveal any reason for the different language. The rest of the relevant legislative history discussed above firmly indicates that Congress intended the ADEA and Title VII amendments to accomplish the same result—subjecting public and private employers to the same employment discrimination coverage. We are not willing, solely on the basis that Congress used different language in the two statutes, to disregard both the evidence that Congress intended the ADEA amendment to parallel the Title VII amendment and the evidence that Congress intended the ADEA amendment to cover public and private employers equally.

Finally, Kelly argues that common sense dictates that the ADEA should impose greater restrictions on governmental employers than privae sector employers.[3] Kelly

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[3] Both Kelly and the EEOC assert, without support, that the twenty-employee minimum for ADEA private employees had a commercial justification—as the EEOC put it, "to protect family or neighborhood 'Mom and Pop' businesses with small incomes from federal government intrusion which would threaten their existence." We question the soundness of this assertion because the congressional record indicates that the minimum was based upon administrative feasibility and the practical consideration that a larger employer with more varied jobs could more constructively utilize an older worker's skills. *See* Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 47 (1967). Even if we were to accept that

(Footnote continued on following page)

cites nothing in the legislative history of section 630(b) to support this assertion. We think common sense dictates that when Congress says it wants the ADEA to have "one set of rules" for both public and private employers, Congress intends the same set of rules to apply to all employers.

We also believe that applying the ADEA to government employers with less than twenty employees would lead to some anomalous results which we do not believe Congress would have intended. For example, Congress has historically viewed the problems addressed by Title VII, racial, sexual, and religious discrimination, to be more serious than the problem of age discrimination. *See EEOC v. Wyoming,* 460 U.S. 226, 231 (1983) (age discrimination rarely based on the sort of animus motivating other forms of discrimination). Congress enacted Title VII first, applied it to the public sector first, and it has always had a lower minimum-employee threshold than the ADEA. Kelly's interpretation, however, would give the ADEA much broader coverage in the public sector than Title VII. We find no support whatsoever in the leg-

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[3] *continued*
commercial reasons played a role in Congress's decision ot adopt a minimum-employee standard, it does not necessarily follow that such commercial concerns do not apply to small government entities. As the Illinois Association of Park Districts points out in its *amicus* brief, the Wauconda Park District is typical in size and financial resources to many Illinois park districts which are independent of other larger governmental entities and thus operate on limited budgets. Therefore, even if Congress had based the twenty-employee minimum for private employers on commercial considerations, Kelly has failed to demonstrate why that requires us not to apply the twenty-employee minimum to public employers.

islative history for Kelly's position that Congress intended to apply the ADEA to government employers with less than twenty employees.

To summarize, we find that both Kelly and the Park District have advanced fair and reasonable interpretations of the language of section 630(b). We therefore must look to the legislative history of the statute, which we find supports the Park District's reading of the statute, *i.e.*, that the twenty-employee minimum applies to government employers. Because there is no dispute that the Wauconda Park District has never employed twenty employees, the district court's decision to dismiss Kelly's complaint is

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX "B"

Duke B. KELLY, Plaintiff,

v.

WAUCONDA PARK DISTRICT, a local Governmental Agency of the State of Illinois, Defendant.

No. 85 C 1462.

United States District Court, N.D. Illinois, E.D.

July 25, 1985.

Terminated maintenance worker brought age discrimination action against park district, and district moved to dismiss. The District Court, Kocoras, J., held that park district did not have sufficient number of employees to meet definition of employer contained in the Age Discrimination in Employment Act of 1967, § 11(b), 29 U.S.C.A. § 630(b), which defines employer as person who has 20 or more employees for each working day in each of 20 or more calendar weeks in current or preceding calendar year, and thus, terminated maintenance worker could not maintain age discrimination action against park district.

Motion granted.

1. Civil Rignts —9.10

Although 1974 amendment to the Age Discrimination in Employment Act, § 11(b), 29 U.S.C.A. § 630(b), which made Act applicable to state and local government employers, does not expressly state that government employers are subject to the Act's 20-employee requirement, Act was not intended to apply to government employers

of less than 20 employees, in light of legislative history and similarities between amendment and parallel amendment of Title VII. Civil Rights Act of 1964, § 701 et seq., as amended. 42 U.S.C.A. § 2000e et seq.

2. Civil Rights —9.10

Park district did not have sufficient number of employees to meet definition of employer contained in the Age Discrimination in Employment Act of 1967, § 11(b), 29 U.S.C.A. § 630(b), which defines employer as person who has 20 or more employees for each working day in each of 20 or more calendar weeks in current or preceding calendar year, and thus, terminated maintenance worker could not maintain age discrimination action against park district.

Timothy P. Whelan, Locke & Learn, Glen Ellyn, Ill., for plaintiff.

Jeffrey D. Colman, Daniel R. Warren, Jenner & Block, Chicago, Ill., for defendant.

MEMORANDUM OPINION

KOCORAS, District Judge:

This matter comes before the court on defendant Wauconda Park District's motion to dismiss. For the following reasons, the motion will be granted.

Plaintiff Duke Kelly was employed by defendant as a maintenance worker from 1972 until he was terminated on February 15, 1983. He alleges he was discriminatorily terminated on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* ("ADEA"). Defendant has moved to dismiss on the

ground that because it is not an "employer" as defined by 29 U.S.C. § 630(b), it is not subject to the provisions of the ADEA.

[1] The ADEA applies to "employers" which it defines as follows:

> The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

29 U.S.C. § 630(b). When originally enacted in 1967, the ADEA specifically exempted government employers.[1] In 1974, however, Congress amended section 630(b) to include state and local government employers. The 1974 amendment added the following language:

> The term ['employer'] also means . . . a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State . . .

Plaintiff argues that since the amendment does not expressly state that government employers are subject to the statute's 20 employee minimum, that Congress did not intend to limit the ADEA's application to state employers with a minimum of 20 employees. The court disagrees. The legislative history of the 1974 amendment, the similarities between it and a parallel amendment of Title VII,[2]

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[1] The original § 630(b) thus went on to state: "but such term ['employer'] does not include . . . a State or a political subdivision of a State." 29 U.S.C. § 630(b).

[2] The federal courts have recognized the "important similarities" between Title VII and the ADEA in terms of their objectives, substantive prohibitions, and legislative histories. *Lorillard* v. *Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978); *EEOC* v. *Elrod*, 674 F.2d 601, 607 (7th Cir. 1982).

and common sense all indicate that Congress did not intend ot make the ADEA applicable to government employers of less than 20 employees.

In 1973, the Senate's Special Committee on Aging recommended that the ADEA be extended to protect government employees because "it is difficult to see why one set of rules should apply to industry and varying standards to government." Special Committee on Aging, U.S. Senate, *Improving the Age Discrimination Law,* at p. 17 (1973). When the 1974 amendment to the ADEA was enacted, its sponsor, Senator Lloyd Bentson of Texas, observed, "[t]he passage of this measure ensures that Government employees will be subject to the same protection against arbitrary employment [discrimination] based on age as are employees in the private sector." 120 Cong.Rec. 8768 (1974). Moreover, as the Seventh Circuit noted in *EEOC* v. *Elrod,* 674 F.2d 601 (7th Cir. 1982), "[t]he final enactment of the ADEA amendment in 1974 completed coverage of public employees on the same basis as private employees." Id. at 607.

The ADEA followed the same legislative pattern as Title VII. Title VII, like the ADEA, originally applied only to private employers who had the requisite number of employees. Title VII is limited to employers of 15 or more persons. 42 U.S.C. § 2000e(b). The language of the 1972 amendment to Title VII, and the cases applying that amendment clearly establish that Title VII's 15-employee requirement applies to both private and government employers. 42 U.S.C. § 2000e(b). *Rogero* v. *Noone,* 704 F.2d 518, 520 (11th Cir. 1983); *Dumas* v. *Town of Mount Vernon, Alabama,* 612 F.2d 974, 977 (5th Cir. 1980).

The parallel amendments of Title VII and ADEA were clearly motivated by the same legislative purpose. As

Senator Bentson explained, the Senate approved the amendment of Title VII in 1972 on the theory "that employees of state and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy." 118 Cong.Rec. 15895 (1972). As Senator Bentson further stated, "the principles underlying these provisions in the EEOC bill are directly applicable to the Age Discimination in Employment Act." *Id.*

Just as Title VII was amended for the express purpose of ensuring that government and private employers would be subject to the same standards, so does it appear that in amending the ADEA in 1974, Congress intended to expose government employers to the same—though no broader—coverage as that of private employers. There is no reason to presume that Congress intended the ADEA to place state and local government employers on anything other than equal footing as private employers—all of whom are subject to liability under the ADEA only if they have the requisite number of employees. Moreover, it would be unreasonable to presume that Congress intended the Title VII amendment to apply that statute's numerical employee minimum to government and private employers alike, but did not intend the ADEA amendment to do the same.

[2] Since it is undisputed that the Wauconda Park District has not had more than three employees who have worked five days in each of twenty or more weeks during any calendar year since 1981, the Park District does not meet the ADEA's definition of employer, a necessary prerequisite to the ADEA's applicability. For that reason, defendant's motion to dismiss will be granted.

No. 86-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DUKE B. KELLY,

Petitioner,

vs.

WAUCONDA PARK DISTRICT, a local Governmental Agency of the State of Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The United States Supreme Court From The Seventh Circuit Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JEFFREY D. COLMAN *
DANIEL R. WARREN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Respondent

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether Congress intended that state and local government employers with less than twenty employees should be subject to the prohibitions of the Age Discrimination in Employment Act, 29 U.S.C. § 630(b).

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STATEMENT OF THE CASE

In this case, both the district court and the court of appeals held that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*, applies to state and local government employers, just as it applies to private

employers, only if they have 20 or more employees. *Kelly* v. *Wauconda Park District*, 612 F.Supp. 1201 (N.D. Ill. 1985), *aff'd* 801 F.2d 269 (7th Cir. 1985).

The Applicable Statutory Provision

Under the ADEA, "employers" are defined in 29 U.S.C. § 630(a) and (b):

> (a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized group of persons.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. . . . The term [employer] also means (1) any agent of such a person, and (2) a State or political subdivision of a State or any agency or instrumentality of a State or a political subdivision of a State. . . .

When originally enacted in 1967, the ADEA specifically exempted state and local government employers. The second sentence of the original § 630(b) thus provided that "[t]he term [employer] also means any agent of such a person but does not include. . . . a State or a political subdivision of a State." In 1974, Congress amended the definition of "employer" in § 630(b) to include government employers within the coverage of the ADEA.

The Uncontested Facts

The facts of this case, as reported by the court of appeals, are not in dispute. 801 F.2d 269, 270 (7th Cir. 1986).

Respondent Wauconda Park District (the "Park District") is a totally independent body of local government,

which is located in the Village of Wauconda, a town of 5,700 people in northern Illinois. The Park District is governed solely by the elected members of a Board of Commissioners who serve without pay. (R. 11, Ex. A, ¶ 3.)* The Park District subsists solely upon the revenues gained from a special, local property tax and other "program revenues," which the Park District generates from the programs and services it provides. (*Id.*, ¶ 4.) In 1982—the year in which petitioner allegedly resigned from his job with the Park District—the Park District was comprised of less than 18 acres of land and had a total budget of approximately $120,000. (*Id.*)

Under this budget, the Park District necessarily was constrained to a very small staff of employees. (*Id.*, ¶ 5.) In fact, during the applicable time period, the Park District had only one full-time, year-round employee, who served as a Director of Parks and Recreation and Secretary to the Board of Commissioners. (*Id.*) In each of the calendar years 1981 and 1982, the Park District employed a total of 13 individuals. (R. 11, Ex. B, ¶ 4.) Only two of these employees worked five days in each of 20 or more weeks during 1981 and 1982. (*Id.*) In fact, the Park District never has had more than three employees who have worked five days in each of 20 or more weeks in any calendar year from 1981 to 1985. (*Id.*, ¶ 3.)

The Decision Of The Court Of Appeals

The district court granted the Park District's motion to dismiss on the ground that the ADEA does not apply to government employers with less than 20 employees.

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* "R. ___" refers to the entry in the Record on Appeal which was filed in the court of appeals.

612 F.Supp. 1201 (N.D. Ill. 1985). The court of appeals affirmed. 801 F.2d 269 (7th Cir. 1986).

At the outset, the court of appeals found § 630(b) to be ambiguous. While petitioner asserted that the language of the statute applies to all state and local government employers regardless of size, the Park District contended that the second sentence of § 630(b) simply makes clear that states and their political subdivisions now are to be included in the term "employer," as defined in the first sentence of § 630(b), which limits the ADEA's reach to employers of 20 or more individuals. 801 F.2d at 270-71. Faced with these "reasonable, but conflicting, interpretations of the plain meaning of section 630(b)," the court of appeals reviewed the legislative history of the 1974 amendment to the ADEA. 801 F.2d at 271.

The court of appeals found three different types of evidence to support its ruling that the ADEA's 20-employee minimum applies to public and private employers alike.

First, the court reviewed the history of the 1974 amendment to the ADEA itself. The ADEA plainly is limited to employers of 20 or more in the private sector, and the court of appeals found substantial evidence that Congress extended the ADEA so that all employers, both public and private, would be governed by "one set of rules." 801 F.2d at 271-72, *quoting from* Special Committee on Aging, U.S. Senate, *Improving the Age Discrimination Law* at 17 (1973).

In addition, the court of appeals also found that Congress modeled its 1974 extension of the ADEA into the public sector directly on its earlier, parallel extension of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, which prohibits employment discrimination based on race, sex, or religion. Under the Title VII

provision which Congress used as a model for the amendment to the ADEA, the minimum employee requirement plainly applies to government and private employers alike. 801 F.2d at 271.

Finally, the court examined the anomalous results which would arise from applying the ADEA to all government employers regardless of size. 801 F.2d at 273. For example, if the ADEA were to apply to government employers regardless of size, then the ADEA would have far broader coverage in the public sector than Title VII. This would be anomalous, for, as the court of appeals noted:

> Congress has historically viewed the problems addressed by Title VII, racial, sexual, and religious discrimination, to be more serious than the problem of age discrimination. Congress enacted Title VII first, applied it to the public sector first, and it has always had a lower minimum-employee threshold than the ADEA.

801 F.2d at 273 (citations omitted).

In response to this abundant evidence of Congress's intent, petitioner failed to uncover anything in the legislative record to support his reading of § 630(b). 801 F.2d at 272, 273. Because it was undisputed that the Park District had less than 20 employees, the court of appeals affirmed the district court's dismissal of this case. 801 F.2d at 273.

ARGUMENT

This case does not present this Court with a reason to exercise its discretionary power of review. The court of appeals properly decided this case, after a careful consideration of the statutory language and a searching examination of the legislative record. As demonstrated in Part I below, petitioner criticizes the court of appeals solely for referring to Title VII as a guide; this criticism is totally without merit. Furthermore, as discussed in Part II, this case presents an issue of statutory construction which apparently has been raised in only one other federal lawsuit. Because of this dearth of litigation, there is no conflict among the circuits, and the issue in this case is not ripe for this Court's consideration.

I. THE COURT OF APPEALS PROPERLY LOOKED TO TITLE VII FOR GUIDANCE IN INTERPRETING THE 1974 AMENDMENT TO THE ADEA.

Petitioner claims that, under *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the court of appeals should not have looked to Title VII for guidance in interpreting § 630(b), but instead should have looked to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* (Pet. 7-11.) This contention is without merit.

Lorillard confirms that the court of appeals properly looked to Title VII in interpreting the extent of the coverage of the ADEA's substantive prohibitions. In *Lorillard*, 434 U.S. at 584, this Court recognized the "important similarities" between the ADEA and Title VII, "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions." While the ADEA incorporated certain remedial and procedural pro-

visions of the FLSA, this Court emphasized that "the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard*, 434 U.S. at 584-85. Because this case relates to the coverage of the ADEA's substantive prohibitions, and does not raise a question of relief or procedure, *Lorillard* establishes that Title VII was an appropriate source of relevant evidence of Congress's intent.

Furthermore, in extending the ADEA's substantive prohibitions into the public sector, Congress demonstrated that it intended to use Title VII as a model. Congress first considered expanding the ADEA in March 1972, at the same time that Congress was enacting a parallel extension of Title VII. 801 F.2d at 271. The sponsor of the ADEA amendment, Senator Bentsen of Texas, explained that the Senate approved the extension of Title VII because "employees of state and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy. . . . I believe that the principles underlying these provisions in the EEOC bill are directly applicable to the Age Discrimination in Employment Act." 801 F.2d at 271, *quoting from* 118 Cong. Rec. 15,895 (1972).*

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* Petitioner also suggests that the court of appeals should have ignored Title VII because Congress supposedly "select[ed] differing authority" as bases for extending the ADEA and Title VII into the public sector. (Pet. 7.) Actually, in *EEOC* v. *Wyoming*, 460 U.S. 226, 243 (1983), this Court upheld Congress's extension of the ADEA under the Commerce Clause, but also expressly reserved the question of whether the ADEA amendment, like Title VII, "could also be upheld as an exercise of Congress's powers under § 5 of the Fourteenth Amendment." Furthermore, petitioner fails to explain how the constitutional basis for Congress's power in extending the ADEA relates in any way to the question of whether the ADEA should apply to all government employers regardless of size.

In addition, even apart from its reliance on Title VII, Congress demonstrated its intent to apply the ADEA's 20-employee minimum in the public sector. For example, when the ADEA amendment was passed in 1974, Senator Bentsen stated that "this measure insures that government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector. 801 F.2d at 272, *quoting from* 120 Cong. Rec. 8768 (1974). As the court of appeals observed, the reports of the House and Senate Committees supporting the ADEA amendment consistently echoed the view that the ADEA should be applied in the public sector in the same way that it is applied in the private sector. 801 F.2d at 272.

Petitioner does not dispute the plain import of Senator Bentsen's remarks or the other evidence cited by the court of appeals, and he fails to muster any evidence to support his own contrary position. Instead, petitioner simply claims that the court of appeals should have relied on the FLSA, without explaining how the FLSA could provide any guidance in this case. In fact, the FLSA—unlike both the ADEA and Title VII—has never been limited to employers of a minimum number employees, either in the public or private sector. *See* 29 U.S.C. § 203(d). Therefore, as the court of appeals recognized, "Congress's intent in amending the FLSA has no bearing" on the question of whether the ADEA's 20-employee minimum applies to public employers. 801 F.2d at 271 n.2.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THIS QUESTION OF STATUTORY CONSTRUCTION.

There is no conflict among the circuits to be resolved by this Court in this matter. The unreported decision of the district court in *EEOC* v. *Hudson Township*, No. C 85-2612A (N.D. Ohio 1986) (reprinted as an Appendix hereto), is the only other federal decision which addresses the question raised in this case. This Court generally does not grant certiorari to review a decision of a federal court of appeals merely because it is in conflict with the decision of a district court. Stern, Gressman, Shapiro, *Supreme Court Practice* § 4.8 (6th ed. 1986). *See also* Rule 17(1)(a) of the Rules of the Supreme Court of the United States.

In *Hudson Township*, the district court held that a local government employer with less than 20 employees was subject to the ADEA, but the court reached this conclusion without any reasoning whatsoever. (*See* App. 3.) Indeed, the court in *Hudson Township* did not attempt to analyze the language of § 630(b) or consider the legislative record of Congress's intent. (*Id.*)

Thus, the court of appeals in this case is the only federal court which has analyzed, in a meaningful way, the question of whether Congress intended the ADEA's 20-employee minimum to apply in the public sector. In conducting this analysis, the court of appeals carefully and thoroughly reviewed all of the relevant evidence contained in the legislative record, and reached the only conclusion which is consistent with that evidence. In these circumstances, the issue in this case is not ripe for this Court to exercise its discretionary power of review.

CONCLUSION

For the reasons stated above, this case does not merit review by this Court, and a Writ of Certiorari should not be granted.

Respectfully submitted,

JEFFREY D. COLMAN *
DANIEL R. WARREN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Respondent

Date: February 20, 1987

* Counsel of Record

APPENDIX

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C85-2612A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

HUDSON TOWNSHIP,

Defendant.

ORDER

The plaintiff, Equal Employment Opportunity Center (hereinafter EEOC), has filed its complaint with this Court alleging that the defendant, Hudson Township, has violated the Age Discrimination in Employment Act (hereinafter ADEA) by engaging in unlawful employment practices with regard to the defendant's alleged refusal to consider for hire, and alleged refusal to hire, Michael Fugo as a full time police officer because of his age. Before the Court is a motion of the defendant, Hudson Township, to dismiss the complaint of the plaintiff, EEOC, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The plaintiff, for its part, opposes the defendant's motion. For the reasons that follow, the defendant's motion to dismiss is denied.

As the basis for its motion, the defendant contends that it is not an "employer" within the meaning of 29 U.S.C. § 630(b) and, therefore, is not amenable to suit under the ADEA. Accordingly, the defendant argues that this Court lacks subject matter jurisdiction over plaintiff's claim. The defendant additionally contends that the entity involved as the prospective "employer" of Michael Fugo is, in actuality, the Hudson Township Police District (hereinafter HTPD) rather than the defendant, Hudson Township.[1] Moreover, the defendant asserts that the HTPD is itself not an "employer" as defined in 29 U.S.C. § 630(b) and hence would also not be subject to the ADEA.

Under 29 U.S.C. § 630(b), the term "employer" for the purposes of the ADEA is defined as follows:

> A person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: provided, that prior to June 3, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a state or political subdivision of a state and any agency or instrumentality of a state or a political subdivision of a state, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the government of the United States.

Defendant argues for a conjunctive reading of § 630(b). That is, the defendant asserts that a "political subdivision of a state" is subject to the ADEA only if such subdivision additionally meets the ADEA's twenty-employee

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[1] The HTPD, not a named defendant in this action, was created by the trustees of the defendant, Hudson Township, pursuant to § 505.48 of the Ohio Revised Code and is a separate political subdivision of the State of Ohio.

requirement. *See, e.g., Kelly v. Wauconda Park District*, 612 F. Supp. 1201 (N.D. Ill. 1985).[2]

This Court, however, rejects such a conjunctive interpretation of 29 U.S.C. § 630(b) in favor of a disjunctive reading thereof. The express language of 29 U.S.C. § 630(b) quite clearly provides three distinct definitions for the term "employer" for purposes of the ADEA. An "employer" under the Act is:

> 1. "A person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ," or
>
> 2. "Any agent of such a person," or
>
> 3. "A state or political subdivision of a state and any agency or instrumentality of a state or political subdivision of a state. . . ."

See, e,g., Coffin v. South Carolina Dept. of Social Services, 562 F. Supp. 579 (D.S.C. 1983).

It being clear to this Court that the defendant, Hudson Township, is clearly a "political subdivision" of the State of Ohio, said defendant is certainly an "employer" for purposes of the ADEA and is amenable to suit for any violation of that Act.[3] The HTPD is likewise an "em-

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[2] *Kelly* is apparently the only case authority espousing such a conjunctive reading of 29 U.S.C. § 630(b). The Court notes that *Kelly v. Wauconda Park District* is presently being appealed to the United States Court of Appeals for the Seventh Circuit.

[3] Even assuming *arguendo* that the twenty-employee requirement of 29 U.S.C. § 630(b) is applicable to a "political subdivision of a state," the Court finds it notable that the named defendant herein, Hudson Township, has not offered any evidence indicating that Hudson Township fails to employ the requisite number of employees for purposes of the ADEA.

ployer" for purposes of the ADEA[4] and would be equally answerable for any ADEA violation.

As noted previously, the defendant additionally argues that the HTPD was, in actuality, Michael Fugo's prospective employer-in-fact and not the defendant, Hudson Township. The defendant argues that the HTPD is a distinct and separate entity from Hudson Township. Implicit in defendant's contention is that the HTPD is *the* "employer" answerable for any violation of the ADEA in the instant proceeding.

The Court finds that the defendant's argument is without merit and that, indeed, the defendant is an "employer" with respect to the hiring decisions concerning Michael Fugo and any other police officer.[5] It clearly appears from the record, and it is uncontroverted by the defendant, that the Hudson Township trustees:

1. Were and are directly and actively involved in the applicant screening and appointment procedure,

2. Appoint the Chief of Police of Hudson Township pursuant to Ohio Revised Code § 505.49; and

3. Generally adopt rules and regulations implemented for the operation of the HTPD.

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[4] As a "political subdivision of a state" or, alternatively, as an "agency or instrumentality of . . . a political subdivision of a state" (to-wit: Hudson Township).

[5] Even were the defendant, Hudson Township, not directly an employer with regard to such hiring decisions and the employment of police officers, it is apparent to the Court that Hudson Township is nonetheless an "employer" with respect to police employment via its relationship with the HTPD. HTPD is clearly an agent/instrumentality of Hudson Township. *See, e.g.*, Ohio Revised Code § 505.49.

Accordingly, the Court denied the motion of the defendant, Hudson Township, to dismiss this action for lack of subject matter jurisdiction.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
U.S. District Judge